FILE COPY

SUPREME COURT U. S.
OCT 27 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

DAN MOODY,
WYMAN S. GIDEON,
Counsel for Cross-Petitioners.

T. L. FOSTER,
MARTIN A. ROW,
GREENWOOD, MOODY & ROBERTSON,
J. B. ROBERTSON,
POWELL, RAUHUT & GIDEON,
J. A. RAUHUT,
Of Counsel.

INDEX.

Subject Index.

	Page
A. Opinions below	1
B. Summary statement of the matter involved	2
C. Statement of the basis upon which it is contended that this Court has jurisdiction to review the judgment in question	4
D. Questions presented	5
E. The facts	7
F. Specification of errors	13
G. Reasons for granting the writ	15
Prayer	24

Index of Authorities.

Cases:

Allen v. *Gulf Oil Corporation*, 139 S. W. (2d) 207	21
Atlantic Oil Production Co. v. *Railroad Commission*, 85 S. W. (2d) 655	18, 21
Atlantic Refining Co. v. *Buckley*, 123 S. W. (2d) 413	21
Baker v. *Cummings*, 181 U. S. 117, 21 Sup. Ct. 578	16
Barnsdall Oil Co. v. *Railroad Commission*, 83 S. W. (2d) 714	18
Barnsdall Oil Co. v. *Railroad Commission*, 90 S. W. (2d) 663	18, 20
Brooks v. *Arkansas-Louisiana Pipe Line Co.*, 77 F. (2d) 965	16
Brown v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935	18, 22, 23
Cain v. *Balcom*, 130 Tex. 497	19
Consolidated Gas Utilities Corp. v. *Thompson*, 14 F. Supp. 318	23
Crane v. *Blum*, 56 Tex. 325	19
Edgar v. *Stanolind Oil & Gas Co.*, 90 S. W. (2d) 656	18, 20, 21
Empire Gas & Fuel Co. v. *Railroad Commission*, 94 S. W. (2d) 1240	18

Page

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817.. 16, 23
Gulf Land Co. v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73 ..... 17, 18, 19, 20, 21, 23
Gulf Land Co. v. *Atlantic Refining Co.*, 113 F. (2d) 902.. 19, 23
Gulf Oil Corp. v. *Rudco Oil & Gas Co.*, 164 S. W. (2d) 222 20
Gulf Oil Corp. v. *Smith*, 145 S. W. (2d) 280..... 21
Harriman v. *Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 493..... 4
Humble Oil & Refining Co. v. *Railroad Commission*, 68 S. W. (2d) 625..... 18
Humble Oil & Refining Co. v. *Railroad Commission*, 85 S. W. (2d) 813..... 18
Henderson v. *Terrell*, 24 F. Supp. 147..... 23
Jones v. *City of Uvalde*, 144 S. W. (2d) 932..... 16
Lippincott v. *Atlantic Refining Co.*, 128 S. W. (2d) 847.. 18
McNeny v. *Railroad Commission*, 96 S. W. (2d) 96.... 20
McWilliams v. *Blackard*, 96 F. (2d) 43..... 16
Magnolia Petroleum Co. v. *Blankenship*, 85 F. (2d) 553. 22
Magnolia Petroleum Co. v. *New Process Production Co.*, 104 S. W. (2d) 1106..... 19
Murphy v. *Turman Oil Company*, 97 S. W. (2d) 485.. 18
Railroad Commission v. *Arkansas Fuel Oil Co.*, 148 S. W. (2d) 895..... 21
Railroad Commission, et al. v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254..... 20, 21, 22
Railroad Commission (Acme) v. *Humble Oil & Refining Co.*, 119 S. W. (2d) 728..... 19
Railroad Commission v. *Lamb*, 81 S. W. (2d) 161..... 18
Railroad Commission v. *Shell Oil Co., Inc.*, opinion of Austin Court of Civil Appeals in Cause No. 9249, filed October 21, 1942, not yet reported..... 19
Railroad Commission v. *Royal Petroleum Corp.*, 93 S. W. (2d) 761..... 18
Railroad Commission v. *Wood*, 95 S. W. (2d) 1328.... 18
Sacks v. *Stecker*, 62 F. (2d) 65..... 16
Shell Petroleum Co. v. *Burnett*, 91 S. W. (2d) 1091.... 18
Shell Petroleum Corp. v. *Railroad Commission*, 86 S. W. (2d) 57..... 19
Shell Petroleum Corp. v. *Railroad Commission*, 137 S. W. (2d) 797..... 22

Page

Siler v. *Louisville & N. R. Co.*, 218 U. S. 175, 29 Sup. Ct. 451 16
Smith v. *Merrill*, 81 F. (2d) 609 23
Smith v. *Shabay*, 83 S. W. (2d) 719 18
Smith v. *Stewart*, 68 S. W. (2d) 627 18
Spear v. *Humble Oil & Refining Co.*, 139 S. W. (2d) 212. 21, 22
Spiller v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 40 Sup. Ct. 466 4
Stanolind Oil & Gas Co. v. *Railroad Commission*, 92 S. W. (2d) 1057 18
Stewart v. *Smith*, 126 Tex. 292, 83 S. W. (2d) 945 20
Sun Oil Company v. *Railroad Commission*, 68 S. W. (2d) 609 ..... 17, 18
Tide Water Associated Oil Co. v. *Railroad Commission*, 120 S. W. (2d) 544 18
Tu ow v. *Barnsdall Oil Co.*, 99 S. W. (2d) 1096 20
Wichita Roy. Co. v. *City Natl. Bank of Wichita Falls*, 306 U. S. 103, 59 Sup. Ct. 420 4
Wilson Cypress Co. v. *Atlantic Coast Line R. Co.*, 109 F. (2d) 263 16

Constitution:

Fourteenth Amendment to the Constitution of the United States 13, 14, 15

Statutes:

Judicial Code, Sec. 240, amended, Act of February 13, 1925, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347) .. 4
Vernon's Texas Statutes, 1936:
Article 6014 3
Article 6029 3
Article 6049c, Sec. 8 2

Texts:

Corpus Juris, Vol. 34, p. 788, Sec. 1206 16
Texas Jurisprudence, Vol. 26, p. 95, Sec. 397 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Cross-petitioners, Sun Oil Company and Magnolia Petroleum Company, are respondents in the Petition for Writ of Certiorari which is being filed by the Railroad Commission of Texas, G. E. Burford, et al. The record being filed with the main petition is here adopted as the record in connection with this cross-petition. Cross-petitioners respectfully show:

A.

Opinions Below.

The first and second opinions of the Circuit Court of Appeals (R. 409, 429) are reported in 124 F. (2d) 467 and

130 F. (2d) 10. The third opinion (R. 474) has not been reported.

B.

Summary Statement of the Matter Involved.

Sun Oil Company, as plaintiff, filed this suit in the United States District Court, Western District of Texas, against G. F. Burford, X Y Z Oil & Gas Company, the Railroad Commission of Texas and its members, as defendants (R. 1). Magnolia Petroleum Company intervened with a similar complaint against the defendants (R. 34). Both complaints seek cancellation of orders of the Railroad Commission granting drilling permit for well locations described as Burford Nos. 1, 2, 3, and 4 on 2.33 acres, which in turn is a part of the W. L. Fuller 102.33 acre tract, Gregg County, Texas, East Texas Field; injunction against drilling and operation of the wells; and alternatively, for injunction against operation of the well locations until such time as the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production of said locations that the total daily production from the 2.33 acres shall not bear a greater proportion to the total daily allowable fixed by the Commission for wells on the remainder of the Fuller tract than the oil reserves under the 2.33 acres bear to the oil reserves under the remainder of the Fuller tract (R. 29, 40).

X Y Z Oil & Gas Company is an assignee of Burford (R. 28, 212).

Jurisdiction was asserted on grounds of diversity of citizenship and Federal questions (R. 2) and found to exist on both grounds (R. 88-9, 90). Such a suit is expressly authorized by state statute. Acts 1935, 44th Leg., p. 180, Ch. 76, Sec. 14 (Ver. Tex. Stats. 1936, Art. 6049c, Sec. 8, Appendix, pp. 26-27).

The orders in controversy were granted as exceptions to the Commission's well spacing rule for the East Texas Field, which rule was adopted pursuant to powers granted by the Texas oil and gas conservation statutes (Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C. S., p. 46, Ch. 26, Secs. 1, 15; Acts 1932, 42nd Leg., 4th C. S., p. 3, Ch. 2, Secs. 1, 7; Acts 1935, 44th Leg., p. 180, Ch. 76, Secs. 2, 4; Ver. Tex. Stats., 1936, Arts. 6014, 6029, Appendix, pp. 25-26), on findings that such general rule is necessary to prevent waste of oil and gas (R. 111-134). This rule provides in substance that no wells shall be drilled at lesser distances than 660 feet from other wells and 330 feet from property lines (i. e., ten acre spacing), "provided that the Commission in order to prevent waste, or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances • • • whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent confiscation of property" (R. 132-3).

The four locations were granted solely on the ground of necessity to prevent confiscation of property (R. 30, 32, 153, 155), and are approximately 24 feet from the sides of the Burford strip (R. 104), referred to in exhibits as 2.21 acres, 2.4 acres, 2.81 acres, and 2.33 acres (R. 104, 138, 141, 168, 190)—a difference in surveying which is immaterial to the questions presented. Respondents call it 2.33 acres and we shall so describe it. Sun's 50 acre leasehold of the Fuller tract has seven wells and adjoins the Burford strip on the west (R. 18, 104). Magnolia's 50 acre leasehold of the Fuller tract has six wells and adjoins the Burford strip on the east (R. 18, 104).

In the district court cross-petitioners attacked the permit orders on the grounds indicated in the statement of Questions Presented, *infra*, pp. 5-7) (R. 20-1, 12-14, 22-3, 17-18, 19, 24-5); and their evidence to establish these grounds is undisputed, as hereinafter shown.

The judgment of the district court found the issues of law and fact with the defendants, and dismissed the complaints (R. 87-8).

Cross-petitioners presented each of the above grounds of complaint by appropriate assignments of error in the Circuit Court of Appeals. That court reversed and remanded the case for new trial (R. 439, 440) without adjudicating the merits, but cross-petitioners contend the record is such that final judgment for cross-petitioners should be entered on the undisputed evidence.

C.

Statement of the Basis upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

(a) Sec. 240 of the Judicial Code as amended by Act of February 13, 1925, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

(b) The judgment to be reviewed was entered July 11, 1942 (R. 429). On August 1, 1942, cross-petitioners timely filed their petition for rehearing on each of the grounds herein asserted (R. 460), which was entertained and overruled on August 13, 1942 (R. 478).

(c) The jurisdiction of this court is not affected by the remand, and this court may grant the writ to render final decree for cross-petitioners if the record is such that a final decree would be proper. *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 25 S. Ct. 493; *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 40 S. Ct. 466; *Wichita Roy. Co.* v. *City Natl. Bank of Wichita Falls*, 306 U. S. 103, 59 S. Ct. 420.

D.

Questions Presented.

1. Whether, in view of the undisputed evidence that the 2.33 acres was created by voluntary subdivision from a 52.33 acre tract capable of development as an entirety in compliance with the general well spacing rule, without an exception, the courts below should have applied the settled law of Texas that the Railroad Commission has no power under those circumstances to grant a permit under the clause "to prevent confiscation of property" (the sole ground on which the orders in controversy were granted), by rendering judgment for cross-petitioners.

2. Whether, under the undisputed evidence that cross-petitioners recovered a final judgment in the District Court of Travis County, Texas, in Cause No. 54769 (consolidated with No. 54743), canceling a prior permit order granted by the Railroad Commission on the same ground of exception as that in controversy in this suit, and on the same strip, to the predecessor in title of Burford and X Y Z Company, which predecessor and the Railroad Commission were defendants in said former suit, the courts below should have applied the settled law of Texas that such a judgment is *res adjudicata* that the Railroad Commission is without power to regrant a permit on such a strip on such ground of exception, by rendering judgment for cross-petitioners.

3. Whether, in view of the undisputed evidence that at the time the orders in controversy were entered there was pending in the District Court of Travis County, Texas, Cause No. 53915. between Sun and Magnolia as complainants and the Railroad Commission and the predecessor in title of Burford and X Y Z Company as defendants, to test the validity of, and to cancel, still another prior permit order, granted by the Railroad Commission on the same

strip and on the same ground of exception as those in controversy, the courts below should have applied the settled law of Texas that pendency of the suit to cancel the prior permit order deprived the Railroad Commission of jurisdiction to grant *pendente lite* another permit on the same tract, for which reason the Circuit Court of Appeals should have rendered judgment for cross-petitioners.

4. Whether, in view of the undisputed evidence that one well on the strip will produce more than the oil under it, the courts below should have applied the settled law of Texas that under such circumstances the Railroad Commission has no power to grant the tract additional wells under the exception clause "to prevent confiscation of property" (the sole ground on which the orders in controversy were issued), by rendering judgment for cross-petitioners; and whether the granting of four wells under such circumstances, in view of the undisputed evidence that the additional wells will cause great loss of recovery by cross-petitioners' wells, deprives cross-petitioners of equal protection of the law and of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. Whether, in view of the undisputed evidence that cross-petitioners offered to pool their adjoining leases, or either of them, with the Burford strip so that the owner of the latter will receive an equitable share in the production from the whole, and the further undisputed evidence that one well on the strip will produce more oil than the amount in place under it, and that four wells thereon will greatly reduce the amount of oil cross-petitioners' wells will recover due to the fact that each well in the area is allowed to produce an equal amount daily, regardless of reserves, cross-petitioners were entitled to rendition of a judgment by the courts below granting their alternative prayer that

the production of oil from the four wells in controversy be enjoined until the Commission shall, after due notice and hearing, so adjust the allowable production of wells on the strip that the total daily allowable therefrom shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the strip bear to the oil reserves in place under the remainder of the Fuller 100 acres; and whether the granting of four wells on the strip under such circumstances, without making proper provision for the protection of cross-petitioners' properties by adjusting the allowables, exceeded the necessities of the case, and was so arbitrary, discriminatory and confiscatory as to cross-petitioners as to deny them equal protection of the law and deprive them of their property without due process of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

E.

The Facts.

The 2.33 acres was created by voluntary subdivision from the remainder of the Fuller 102.33 acres. (Area A-B-C-D on Exhibit 1—R. 104; R. 108, 109-110, 3-4). In December, 1930, Mamie Hammonds, owner of the lease on the entire tract, assigned the east 50 acres to persons who subsequently assigned to Magnolia; and in February, 1931, she assigned the west 50 acres to Sun Oil Company, thus leaving in between the strip 49 feet in width. (Stipulation, R. 109-10, referring to allegations in the Complaint, R. 3-4).

When this subdivision was made, the Commission's spacing rule provided that no wells shall be drilled less than 150 feet from property lines or less than 300 feet from other well locations (R. 111). By amendments these requirements were later increased to a minimum of 330 feet from

property lines and 660 feet from other wells (R. 112-134). The Railroad Commission's general order of May 29, 1934, provides that in applying the spacing rule no subdivision of property made subsequent to adoption of the original rule shall be considered in determining whether any property is being confiscated within the terms of the rule (Allegations of Complaint, R. 8-9, undenied by answers, R. 41, 45, 49).

Nevertheless, Burford's application for permit was to drill four wells *on the 2.33 acres* ("Form 1," R. 138, and accompanying plat, R. 141; and his second application, R. 147, 150); and the notices of hearing thereon likewise recognize that this was an application to drill on the strip separately—in other words, on the basis of the subdivision rather than on a disregard of it (R. 142, 152, 385). Only those operators having leases adjacent to the 2.33 acres were notified of the hearings, and such notice was not given to Amerada Petroleum Corporation, owner of a lease adjoining the land from which the strip was subdivided (R. 104, 142, 152, 385).

Following the first hearing, the Commission denied all four locations. Following the second hearing, it granted No. 2 on the ground of necessity to prevent confiscation of property, and denied Nos. 1, 3 and 4. Following the third hearing, it granted all four locations on the ground of necessity to prevent confiscation of property. But each of such orders expressly dealt with it as a 2.33 acre tract—granted permit on the basis of giving effect to the subdivision, rather than disregarding it (Complaint, paragraph 5, R. 10-12, admitted by the answers; R. 153, 30; 155, 31-2; 161).

Both tracts created by the *original* subdivision of the Fuller tract—i. e., the east 50 acres and the west 52.33 acres—were sufficiently large to be drilled in compliance with the spacing rule then in existence; but of the tracts

created by the *second* subdivision—i. e., the west 50 acres and the middle 2.33 acres—only the west 50 acres was sufficiently large, and the 2.33 acre strip was too narrow to comply with the rule (R. 104).

Undisputed testimony was offered on the trial that the west 52.33 acres, without Burford locations Nos. 1 to 4, was reasonably protected from drainage and will recover its recoverable oil with the wells already drilled (R. 367-8).

On October 11, 1934, long before the strip was assigned to Burford and X Y Z Company, the Commission granted Mamie Hammonds permit to drill on this same strip (R. 163) on *both* grounds of exception to the spacing rule (R. 190-1); and in Cause No. 54769 (consolidated with No. 54743), District Court of Travis County, Texas, cross-petitioners obtained a final judgment (R. 185) against the Railroad Commission, Hammonds and others (predecessors of Burford and X Y Z Company—R. 212), canceling the permit order on allegations that it was granted in violation of the spacing rule and that the strip was not entitled to development as a separate tract (R. 164, 174-6).

Cross-petitioners urged the judgment as *res adjudicata* at the hearings before the Commission's examiner (R. 234-6, 296, 330-1), again in their motion for rehearing before the Commission (R. 157), and the Complaint expressly pleads the judgment as *res adjudicata;* that there has been no such change of conditions as would entitle the strip to a permit; that the reservoir conditions under the strip were the same and bear the same relation to the reservoir conditions in the field generally as at the date of said judgment and date of the permit thereby canceled; and that the Burford locations are no more necessary than the location canceled by said judgment (R. 12-13).

On the trial of the instant case, undisputed testimony was offered to the effect that since the date of the Hammond permit, which was canceled in the suit just mentioned, there

had been no change of conditions requiring any of the well locations here involved to enable the west 52.33 acres of the Fuller tract to recover the equivalent of the oil under it or to protect it from drainage, and that such west 52.33 acres is as well protected from drainage and is recovering the oil through existing wells as efficiently as it was when this prior permit was granted (R. 375-6); and respondents' witness corroborated this on the trial (R. 395-6).

Cause No. 53915, styled Sun Oil Company *v.* Railroad Commission and Mamie Hammonds, in which Magnolia intervened, was pending in the District Court of Travis County for final trial at the time Burford's application was filed, heard and granted by the Railroad Commission (R. 205-6, 208). Said suit was for the purpose of canceling still another order granting Mamie Hammonds permit to drill on this same strip, and it was an issue in said suit that the strip, being a subdivision, was not entitled to be developed as a separate tract under the spacing rule (R. 192, 197-8, 203).

Cross-petitioners urged before the Railroad Commission that it had no jurisdiction of the Burford application because of the pendency of that suit (R. 157, 236-7, 238, 295, 331), and the complaint expressly asserts that the Commission was without jurisdiction on this ground and that the Burford permits are therefore void (R. 13-14). After the Commission had granted the Burford permits and this suit had been filed, Cause No. 53915 was disposed of by final judgment of the District Court of Travis County in November, 1939, annulling the Hammonds permit order there involved (R. 208).

It was shown that Burford did not contend he needed four wells to enable him to recover the eqivalent of the oil in place under the strip (R. 233-293, 294-317, 318-365), but that undisputed evidence at the hearing on his application showed one well on the strip would produce more oil

than there is under it (R. 362-3). The Commission's proration order allowed each well in the area to produce up to a flat 20 barrels per well daily, irrespective of the size of the tract or reserves in place (R. 370). Sun's 50-acre lease had seven wells and Magnolia's 50-acre lease had six wells (R. 18, 104, 141), from which it follows that the allowable of four wells on the 2.33 acres would be 4/7ths as great as the total allowable from Sun's 50 acres and 2/3rds as great as the total allowable of Magnolia's 50 acres; and this will result in drainage from the adjacent tracts (R. 349-350; 368-9). It is undisputed that with four wells on the strip, Sun would lose between 70,000 and 100,000 barrels of oil which its wells might otherwise have produced, valued at $1.10 per barrel (R. 369), and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss (R. 377); that the four locations on the strip are each approximately 24 feet from cross-petitioners' leases, whereas cross-petitioners' nearest wells are roughly 330 feet from the strip (R. 104); that allowance of the Burford locations will make it necessary for Sun and Magnolia to drill additional wells "just to meet the offsets" (R. 368-9); that the high concentration of wells which would result would lower the pressure; reduce the flowing life, increase the operating expenses, and thereby cause loss to cross-petitioners (R. 371, 376-7). Cross petitioners expressly urged before the Commission that four wells on the strip as a separate tract were not necessary to give it an opportunity to produce the equivalent of the oil under it; that one well would give it a great advantage over cross-petitioners' leases, and four wells would confiscate their property without compensation and deny them due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States (R. 158). Cross-petitioners tendered before the Commission (R. 158) and also in court (R. 19)

an offer to pool their leases with the strip for development as an entire tract in either of three ways: (a) the strip and the Sun lease; (b) the strip and the Magnolia lease; and (c) one-half of the strip with the Sun lease and one-half with the Magnolia; and under either method offered to share ratably the future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses.

Cross-petitioners, in the alternative, requested the Commission, in case it should hold that there is any reasonable basis for permitting the drilling of each or either of said four locations on the strip as a separate tract, to so adjust the allowable production of such locations as the Commission should decide to permit on the strip, and so condition the permit therefor, that the total daily allowable production from the 2.33-acre strip shall not exceed 2.33/100ths of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract; and urged that such provision and condition would enable Burford to produce only his fair share of the oil in place (R. 159-60). The Commission denied all relief so requested by appellants (R. 161).

Undisputed testimony was offered on the trial that the granting of the alternative request for adjustment of allowable would have given Burford his share of the oil and would have lessened the drainage from cross-petitioners' leases (R. 370-1).

The Complaint expressly alleged that four wells are not needed to give the strip an opportunity to produce its share of the oil, that one well would give the strip more than its share, and the other injurious effects upon cross-petitioners resulting from granting four wells (R. 17-18, 21-23, 26-27); that the granting of four wells was in violation of the State law (R. 12); that they have no recourse for the value

of the oil and gas which will be drained from their property (R. 23); that the granting of four wells under those circumstances denies them equal protection of law and deprives them of their property without due process of law (R. 23); that if there was any basis for granting four wells, the order was nevertheless unreasonable, discriminatory, and confiscatory in the light of the allowable order, because the Commission could have adjusted the allowable, thereby materially lessening the injury to cross-petitioners, and the granting of the permits without such adjustment or other proper provision for the protection of their property exceeded the necessities of the case and is arbitrary, unreasonable, discriminatory, and confiscatory, violating their rights under the Fourteenth Amendment to the Constitution of the United States (R. 24-5).

F.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In failing to render judgment annulling the permit orders and granting injunctive relief ancillary thereto as prayed by cross-petitioners, on the undisputed evidence that the 2.33 acres was voluntarily subdivided from the west 50 acres in such way that it does not comply with the spacing rule, and that, disregarding the subdivision, the west 52.33 acres did not need additional wells to protect it from drainage, the law of the State being that under such circumstances the Commission has no power to grant permits on the strip "to prevent confiscation of property," the sole ground on which these permit orders were granted.

(2) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because as a matter of State law, under the undis-

puted evidence, the judgment in Cause No. 54769 (consolidated with No. 54743) is *res adjudicata* against Burford's and X Y Z Company's claim of right to the permits here involved and against the Commission's claim of power to grant them.

(3) In failing to render judgment annulling the permit orders and granting ancillary injunctive relief, because under the law of the State the pendency of Cause No. 53915 in the District Court of Travis County, Texas, deprived the Railroad Commission *pendente lite* of jurisdiction to grant permits to Burford on the same tract there involved.

(4) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because, if the strip may be lawfully considered as a separate tract, then as a matter of State law, the Commission's action in permitting four locations was arbitrary in view of the undisputed evidence that there is no necessity for four, or more than one, to give the owners of the strip an opportunity to recover the amount of oil in place or to prevent confiscation of their property, and that the drilling of four thereon will cause drainage of large quantities of cross-petitioners' oil and otherwise injure their property; the granting of four locations being without authority in the State law, and deprives cross-petitioners of equal protection of the law and of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) In failing to render judgment granting cross-petitioners' alternative prayer for injunction against production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the

total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil reserves in place under the remainder of the Fuller 100 acre tract, under the undisputed evidence that one well would give the strip its full share of oil, that cross-petitioners had offered to pool, and that either such pooling or adjustment of allowables would afford the owners of the strip the amount of oil under it and at the same time would prevent or greatly reduce the drainage from cross-petitioners and other injuries which will otherwise occur; it appearing as a matter of law that without such relief the granting of four wells exceeded the necessities of the case and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, denying them equal protection of the law and taking their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) In failing to hold that the trial court erred in its finding of fact No. V, to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not *res adjudicata* of the permits in the case at bar.

(7) In failing to hold that the trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution of the United States.

G.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to

call for an exercise of this court's power of supervision, in this: Under the established law of the State of Texas applied to the undisputed facts, the permit orders involved are void and cross-petitioners are entitled to judgment annulling them and ancillary injunctive relief. The trial court stated in its conclusions of law that it is of the opinion that "the various matters of state law raised present no Federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction"; and further suggested that the parties should be "relegated to the state courts" for determination of the matters of state law (R. 91-2); but the judgment of the trial court dismissed the complaints without reserving to cross-petitioners the right to present matters of state law to the state courts (R. 87); and in legal effect this is an adverse adjudication of such matters, under the state and federal decisions. 34 *C. J.* 788, Sec. 1206; *Jones* v. *City of Uvalde*, (Civ. App.) 144 S. W. (2d) 932 (writ refused); 26 *Tex. Jur.* 95, Sec. 397; *Baker* v. *Cummings*, 181 U. S. 117, 21 S. Ct. 578; *McWilliams* v. *Blackard*, (C. C. A. 8) 96 F. (2d) 43; *Sacks* v. *Stecker*, (C. C. A. 2) 62 F. (2d) 65, headnotes 8 and 9; *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, (C. C. A. 5) 109 F. (2d) 623, 625; *Brooks* v. *Arkansas-Louisiana Pipe Line Co.*, (C. C. A. 8) 77 F. (2d) 965, 968.

Although cross-petitioners requested the Circuit Court of Appeals to adjudicate the matters of state law and render judgment thereon for cross-petitioners, the Circuit Court of Appeals did not adjudicate such matters, nor decide whether they had been rightly or wrongly decided by the trial court. On the contrary, though recognizing the duty of the federal courts to apply the state law (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817; *Siler* v. *Louisville & N. R. Co.*, 218 U. S. 175, 29 S. Ct. 451) it reversed and remanded the case with instructions to the trial court to again adjudicate the matters of state law (R. 429, 440, 474).

Cross-petitioners urge that under the usual and accepted procedure it was the duty of the Circuit Court of Appeals to adjudicate the matters of state law and itself render judgment thereon for cross-petitioners, the requisite facts being undisputed. The Circuit Court of Appeals could determine such law questions as readily as the trial court, and by doing so additional delay and expense of litigation would be avoided. By granting a writ of certiorari this Court may render the final decree which the Circuit Court of Appeals should have rendered, under authorities cited, *supra*, p. 4.

2. The Burford strip having been created by voluntary subdivision from the west 50 acres in such width that it cannot be drilled in compliance with the spacing rule in existence at the time, under the settled law of Texas the Railroad Commission was without power to grant an exception to the spacing rule authorizing drilling of wells on the strip on the ground of necessity "to prevent confiscation of property" (the sole ground on which those in controversy were granted), and therefore the Burford permit orders are void. *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, 81, holding with reference to such subdivisions, "exception permits may be issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation." *Sun Oil Company* v. *Railroad Commission*, (Civ. App.) 68 S. W. (2d) 609, 613, affirmed 125 Tex. 540, 84 S. W. (2d) 693, applying this same rule and explaining the underlying reason therefor to be that the spacing rule, validly issued and operating prospectively, has the same force and effect as a legislative act, and therefore all parties dealing with mineral leasehold titles must take cognizance of the rule and make their contracts and conveyances in keeping with its terms and not in violation of it, so that no right to an exception can arise from the carving

out of a tract, while the rule is in effect, in such shape or size that no well can be drilled thereon in compliance with the rule; that to hold otherwise would set at naught the conservation laws of the state; and that the Commission, while keeping the general spacing rule in effect, cannot itself arbitrarily grant exceptions thereto which would indubitably destroy the efficacy of the rule itself. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 945; *Lippincott* v. *Atlantic Refining Co.*, (Civ. App.) 128 S. W. (2d) 847, 848; *Humble Oil & Refining Co.* v. *Railroad Commission*, 68 S. W. (2d) 625 (application for writ dismissed); *Smith* v. *Stewart*, 68 S. W. (2d) 627, affirmed 83 S. W. (2d) 945; *Railroad Commission* v. *Lamb*, 81 S. W. (2d) 161, 163; *Barnsdall Oil Co.* v. *Railroad Commission*, 83 S. W. (2d) 714 (writ refused); *Smith* v. *Shabay*, 83 S. W. (2d) 719; *Humble Oil & Refining Co.* v. *Railroad Commission*, 85 S. W. (2d) 813 (application for writ dismissed); *Edgar* v. *Stanolind Oil & Gas Co.*, 90 S. W. (2d) 656, 657 (writ refused); *Barnsdall Oil Co.* v. *Railroad Commission*, 90 S. W. (2d) 663; *Shell Petroleum Co.* v. *Burnett*, 91 S. W. (2d) 1091; *Railroad Commission* v. *Royal Petroleum Corp.*, 93 S. W. (2d) 761 (writ dismissed); *Stanolind Oil & Gas Co.* v. *Railroad Commission*, 92 S. W. (2d) 1057 (writ refused); *Empire Gas & Fuel Co.* v. *Railroad Commission*, 94 S. W. (2d) 1240, 1242 (writ refused); *Railroad Commission* v. *Wood*, 95 S. W. (2d) 1328 (writ refused); *Murphy* v. *Turman Oil Company*, 97 S. W. (2d) 485, 487 (writ dismissed); *Tide Water Associated Oil Co.* v. *Railroad Commission*, 12[illegible] S. W. (2d) 544, 545.

The Railroad Commission cannot grant permits in disregard of its own rule, and if it does they are void and the courts will annul them. *Sun Oil Company* v. *Railroad Commission* (Civ. App.), 68 S. W. (2d) 609, 612; *Atlantic Oil Production Co.* v. *Railroad Commission*, 85 S. W. (2d) 655, 657 (writ dismissed); *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 944-5; *Gulf Land Co.*

pany v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, where in affirming judgment canceling a permit, the court said (p. 79) "We think the Commission is bound by its own rule • • •" and (p. 86) "It is evident from what we have said that we hold the Commission violated its own order in issuing this well permit to prevent confiscation of property."

3. The proper court of the state in Cause No. 54769 had already determined that no right to an exception exists to drill a well on this strip, and annulled a prior permit. This was a suit between cross-petitioners on the one hand and the Railroad Commission and Burford's and X Y Z Company's predecessor in title on the other hand, and since no material changes in conditions have occurred creating any better reason for drilling the strip now than existed when the former permit was granted, such judgment, under the settled law of the state, is *res adjudicata* against Burford's and X Y Z Company's claim of right to drilling permits on the strip, and against the Commission's claim of power to grant them. *Shell Petroleum Corp.* v. *Railroad Commission*, 86 S. W. (2d) 57, 59 (writ dismissed); *Magnolia Petroleum Co.* v. *New Process Production Co.*, 104 S. W. (2d) 1106, 1110; *Railroad Commission (Acme)* v. *Humble Oil & Refining Co.*, 119 S. W. (2d) 728, 729, 730 (writ refused); *Gulf Land Co.* v. *Atlantic Refining Co.* (C. C. A. 5), 113 F. (2d) 902, 905; *Cain* v. *Balcom*, 130 Tex. 497; *Crane* v. *Blum*, 56 Tex. 325; *Railroad Commission v. Shell Oil Co., Inc.*, opinion of Austin Court of Civil Appeals in Cause No. 9249, filed October 21, 1942, not yet reported.

4. Under the law of the State the Railroad Commission is without jurisdiction to grant additional permits on a tract while the courts are in the process of determining validity of a drilling permit previously granted on the same tract. The Railroad Commission therefore had no jurisdiction to grant the Burford permits because at that

time Cause No. 53915 was pending in the District Court of Travis County, the purpose of which suit was to test the validity of, and to annul, a prior order of the Railroad Commission granting the predecessor in title of Burford and X Y Z Company a permit to drill on this same strip. The Commission being without jurisdiction of the subject matter, its orders permitting Burford to drill are void under the established law of the State. *Stewart* v. *Smith*, 126 Tex. 292, 83 S. W. (2d) 945, 947, holding "• • • after the judicial arm of the state had assumed jurisdiction of the matter, the Railroad Commission undertook to act again • • • the Railroad Commission was without jurisdiction." *Gulf Oil Corporation* v. *Rudco Oil & Gas Co.* (Civ. App., 1942), 164 S. W. (2d) 222; *Barnsdall Oil Co.* v. *Railroad Commission* (Civ. App.), 90 S. W. (2d) 663, 664; *Edgar* v. *Stanolind Oil & Gas Co.* (Civ. App.), 90 S. W. (2d) 656 (writ refused); *Turnbow* v. *Barnsdall Oil Co.* (Civ. App.), 99 S. W. (2d) 1096, 1100 (writ refused); *McNeny* v. *Railroad Commission* (Civ. App.), 96 S. W. (2d) 96, 98-9, holding:

> "• • • as long as a suit is pending to test the validity of a permit to drill on a specific tract of land as an exception to rule 37, the Commission is deprived of all jurisdiction to entertain or consider a subsequent application for such permit, and any order it may enter in that regard is void."

5. The "confiscation" exception clause in the spacing rule relates to giving a tract, entitled to development, such number of wells as are necessary to enable the owner thereof to recover the oil and gas in place under the tract, *or their equivalents in kind. Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 85; *Railroad Commission et al.* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, 255. Obviously, the Commission made no attempt to apply the term in that sense to this

2.33 acre strip in granting it four wells, when the undisputed testimony showed that one would produce more than the oil in place under it; and as stated in *Atlantic Refining Co.* v. *Buckley* (Civ. App.), 123 S. W. (2d) 413, 415 (writ dismissed), "The net result of this would be that under the guise of protecting this small tract from confiscation, he would be enabled to confiscate oil from adjacent tracts."

In the *Gulf Land Company* case, the Texas Supreme Court said, page 85:

> "In administering our oil and gas conservation statutes, *the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same field.* • • •
>
> "In the exercise of its power to grant exceptions to its rules, it is the duty of the commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; • • •." (Italics ours.)

The Commission is without power, under the confiscation ground of exception, to grant a tract permits for more wells than are necessary for such purpose, and therefore its action in granting four, when one will produce more than the oil under the strip, was arbitrary and should be annulled. *Railroad Commission, et al.* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, affirming opinion of the Court of Civil Appeals in 115 S. W. (2d) 505; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73; *Atlantic Oil Production Co.* v. *Railroad Commission*, (Civ. App.) 85 S. W. (2d) 655; *Edgar* v. *Stanolind Oil & Gas Co.*, (Civ. App.) 90 S. W. (2d) 656, 658 (writ refused); *Railroad Commission* v. *Arkansas Fuel Oil Co.*, (Civ. App.) 148 S. W. (2d) 895, 898; *Gulf Oil Corporation* v. *Smith*, (Civ. App.) 145 S. W. (2d) 280, 283; *Allen* v. *Gulf Oil Corporation*, (Civ. App.) 139 S. W. (2d) 207, 209; *Spear* v. *Humble Oil & Refining*

Co., (Civ. App.) 139 S. W. (2d) 212, headnote 3; *Shell Petroleum Corporation* v. *Railroad Commission*, (Civ. App.) 137 S. W. (2d) 797, 798.

6. The action of the Railroad Commission in permitting four wells on the strip in the light of the existing proration order and cross-petitioners' offer to pool their properties with the strip for development purposes, when one well would have given the strip more than its share of the oil, without making provision for the protection of cross-petitioners' property by adjusting the allowable of wells on the strip, exceeded the necessities of the case, and was arbitrary, discriminatory and confiscatory as to cross-petitioners, denying them equal protection of the law and taking their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 944, in which the Supreme Court of Texas stated that if conditions arise where it would be proper to drill on a subdivided strip, "* * * in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." *Magnolia Petroleum Co.* v. *Blankenship*, (C. C. A. 5) 85 F. (2d) 553, 555, 556; *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, 255, holding:

> "* * * the facts of this record show, as a matter of law, that a third well on this tract would enable Tippett to recover more than his fair share of the oil and gas in or under his land, or their equivalents in kind. Under such a record, the granting of this permit to prevent confiscation was an abuse of power on the part of the Commission, and therefore unlawful."

Ownership in place is a rule of property in Texas. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 944. By the conservation statutes and rules cross-petitioners are limited both in number of wells they may drill and the quantity of oil and gas they may produce, so that they may no longer fully fend for themselves; and because of this, proper provision must be made so that Burford and X Y Z Company may not take undue advantage of them. *Henderson* v. *Terrell*, (W. D. Tex., 1938) 24 F. Supp. 147, 152. The Railroad Commission "must be fair and must not indulge in unreasonable discrimination * * * between different tracts of land in the same field." *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 85. The granting of four wells on the strip, without adjusting the allowable, has the effect of taking oil from cross-petitioners and giving it to Burford and X Y Z Company. This is confiscatory and discriminatory. *Consolidated Gas Utilities Corp.* v. *Thompson*, 14 F. Supp. 318, 328.

The police power is not to be used to benefit one at the expense of another. There was a way open to the Commission to accomplish fully any legitimate objective without placing the permittee in position so greatly to drain cross-petitioners' oil, and in the light of the facts the action of the Commission violates cross-petitioners' rights under the Fourteenth Amendment to the Constitution of the United States.

7. The action of the Circuit Court of Appeals in failing to apply the State law is in conflict with the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, declaring that to be its duty; and is in conflict with the action of the Circuit Court of Appeals, Fifth Circuit, in *Gulf Land Co.* v. *Atlantic Refining Co.*, 113 F. (2d) 902, and *Smith* v. *Merrill*, 81 F. (2d) 609, being cases of similar nature in which it actually undertook to apply the state law.

8. The judgment of the Circuit Court of Appeals affects the rights of cross-petitioners in a substantial way, as hereinabove shown.

WHEREFORE, cross-petitioners pray that writ of certiorari be issued to the Circuit Court of Appeals, Fifth Circuit, to the end that this Court may review and determine this cause on the full and complete transcript of the record and proceedings in the case numbered and entitled on its docket 9962, *Sun Oil Company, et al., Appellants,* v. *G. E. Burford, et al., Appellees,* and that only that portion of the judgment of said Circuit Court of Appeals which remands the cause to the District Court be set aside, and that judgment be here rendered for cross-petitioners annulling the permit orders involved and enjoining the drilling and operation of the four well locations, and in the alternative that judgment be rendered enjoining the operation of said wells until such time as the Railroad Commission shall adjust the allowables thereof, as more fully prayed in cross-petitioners' complaints below; for costs and such other relief as to this Court may seem proper and just.

SUN OIL COMPANY,
MAGNOLIA PETROLEUM COMPANY,
Cross-Petitioners;
T. L. FOSTER,
MARTIN A. ROW,
Dallas, Texas;
GREENWOOD, MOODY & ROBERTSON,
DAN MOODY,
J. B. ROBERTSON,
POWELL, RAUHUT & GIDEON,
J. A. RAUHUT,
Austin, Texas,
Of Counsel for Cross-Petitioners.

DAN MOODY,
WYMAN G. GIDEON,
Counsel.

APPENDIX.

Vernon's Texas Statutes, 1936.

Art. 6014. "*Waste.*"—The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

* * * * * * *

(b) The drowning with water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

* * * * * * *

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be united under one management, control or ownership.

* * * * * * *

The Commission may consider any or all of the above definitions, whenever the facts, circumstances or conditions make them applicable, in making rules, regulations or orders to prevent waste of oil or gas.

* * * * * * *

(Acts 1919, p. 285; Acts 1929, 41st Leg., p. 694, ch. 313; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, § 1; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, § 1; Acts 1935, 44th Leg., p. 180, ch. 76, § 8.)

Art. 6029. Rules and regulations.—The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum, oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

* * * * * * *

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

* * * * * * *

(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

* * * * * * *

(Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, § 15; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, § 7; Acts 1935, 44th Leg., p. 180, ch. 76, § 4.)

Art. 6049c. Oil and gas conservation. Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission,

or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, § 8; Acts 1935, 44th Leg., p. 180, ch. 76 § 14.)